



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/152547

PRELIMINARY RECITALS

Pursuant to a petition filed October 03, 2013, under Wis. Stat. §49.45(5), and Wis. Admin. Code §HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance (MA), a telephonic hearing was held on November 12, 2013, at Waukesha, Wisconsin.

The issues for determination are 1) whether the agency correctly denied petitioner's MA for the daily care rate in the nursing home from May 15, 2013 through June 12, 2013 due to divestment and 2) whether the agency correctly denied the home maintenance deduction when it determined the petitioner's MA institutional patient liability effective June 13, 2013.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Lori Rutzinski, ESS

Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) was a resident of Waukesha County. She passed away on August 19, 2013.
2. On May 13, 2013 petitioner was admitted to a nursing home.
3. On May 15, 2013 petitioner applied for MA.
4. On May 15, 2013 petitioner's power of attorney, friend and housemate (hereinafter [REDACTED]) withdrew \$6298.63 from petitioner's checking account and deposited the sum in [REDACTED] checking account.
5. [REDACTED] and petitioner were joint tenants with a right a survivorship in the home they shared until petitioner's institutionalization.
6. [REDACTED] used \$1062.94 of the withdrawn funds to pay the mortgage on the shared home.
7. On July 1, 2013 the agency issued a notice of decision to petitioner stating that her MA for nursing home care was denied from May 15, 2013-June 12, 2013 due to divestment of \$6298.63, but that she was eligible for MA card services during that time frame.

DISCUSSION

1. Divestment

A divestment is a transfer of assets for less than fair market value. Wis. Stat. §49.453(2)(a); see also *Medicaid Eligibility Handbook (MEH)*, §17.2.1, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. A divestment made within 60 months after petitioner's institutionalization and MA eligibility for nursing home MA may cause ineligibility for that type of Wisconsin MA. Wis. Stat. §49.453(1)(f); *MEH*, §17.3. The ineligibility is only for the daily care rate in the nursing home; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in Wis. Stat. §49.453(3), to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (at the time of the denial it was \$6,554). *MEH*, §17.5 (Release #12-02).

[REDACTED] did not dispute the occurrence of the divestment or the calculations for it. Rather, she is asking this ALJ to consider her intent in transferring the monies from petitioner's account to her own. The stated intent was to be able to pay her and the petitioner's mortgage payment and to pay petitioner's various credit card bills at that time and ongoing.

(d) Circumstances under which divestment is not a barrier to eligibility. An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. DHS 101.03 (95) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or
2. It is shown to the satisfaction of the department that one of the following occurred:
 - a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
 - b. The resource was transferred exclusively for some purpose other than to become eligible for MA;

- c. The ownership of the divested property was returned to the individual who originally disposed of it; or
- d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists.

Wis. Adm. Code §DHS 103.065(4)(d).

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the agency, such as the denial of MA due to a divestment of assets was improper given the facts of the case. See 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstances at the time. A divestment can still exist even if someone does the transfer of the nonexempt asset other than the individual. Such a person could be, for example, a power of attorney (POA).


In this case, the petitioner was represented at the hearing by her POA and authorized representative. They presented some evidence of the use of the transferred funds which showed that [REDACTED] paid for the mortgage in the undisputed amount of \$1062.94. I add that joint tenants have an equal interest in the whole property for the duration of the tenancy. See Wis. Stat. §700.17(2)(a). There was testimony that petitioner also had minimum monthly credit card payments in the amount of approximately \$1100 that was paid in part, or in full. The accounting of all of those funds was not made available, but it appears from the evidence that was presented that some parts of the withdrawn funds were paid out for petitioner. As such [REDACTED] was acting on petitioner's behalf, and the funds were utilized to pay for petitioner's expenses. The funds were in effect "returned" to the petitioner and thus not a divestment under the regulatory section cited above. I am therefore remanding the matter to the agency in order for them to determine the extent of that return and if any divestment in fact resulted; if not, then the agency shall determine if s/he met all other eligibility requirements during this retroactive adjustment period. I add that this may not ultimately benefit petitioner's position as it was stated by the agency that petitioner was over the asset limit had the divestment not occurred. However, without a full accounting to show that it was petitioner's expenses that were paid, this may or may not still be true.

2. Home maintenance deduction

Petitioner was found MA eligible after the divestment period expired. After an institutionalized person is determined eligible for MA, a county agency must calculate the amount of income the institutionalized person must contribute to defray the cost of care incurred by MA on his or her behalf on a monthly basis. This is referred to as the person's "patient liability." The calculation begins with gross income, and only a few items may be subtracted as deductions. These include the statutory \$45 personal deduction and, in some cases, a home maintenance deduction. Wis. Admin. Code §DHS 103.07(1)(d), and the federal rule at 42 C.F.R. §435.725. The formula for calculating the patient liability amount is set out at *MEH*, §27.7.1.

The petitioner does not contest the date of the nursing home admission or the gross income amount. Rather, her representatives question why her mortgage expense was not subtracted in the patient liability computation, because the mortgage expense can be subtracted in certain circumstances:

15.7.1 Maintaining Home or Apartment

If an institutionalized person has a home or apartment, deduct an amount from his/her income to allow for maintaining the home or apartment that does not exceed the SSI  payment level plus the E supplement for one person (See 39.4.1). The amount is in

addition to the personal needs allowance (See 39.4.2 EBD Deductions and Allowances). It should be enough for mortgage, rent, property taxes (including special assessments), home or renters insurance, utilities (heat, water, sewer, electricity), and other incidental costs.

Make the deduction only when the following conditions are met:

1. A physician certifies (verbally or in writing) that the person is likely to return to the home or apartment within six months, and
2. The person's **spouse** is not living in the home or apartment.

Deduct this amount for no more than six months. If the person is re-admitted to the institution, grant a six month continuance. A physician must again certify that s/he is likely to return to the home or apartment within six months.

The home maintenance allowance can be granted at any time as long as the person is institutionalized. It is not limited to the first six months of institutionalization.

MEH, §15.7.1.

The petitioner's representatives did not provide a physician statement that she was likely to return to her home within six months. Because the petitioner did not provide the agency with written confirmation that she was expected to return to home within six months, the agency correctly followed policy in declining to subtract her home expense in the patient liability computation.

The controlling federal rule provision reiterates the six-month deduction limitation:

(d) *Optional deduction: Allowance for home maintenance.* For single individuals and couples, an amount (in addition to the personal needs allowance) for maintenance of the individual's or couple's home if—

- (1) The amount is deducted for not more than a 6-month period; and
- (2) A physician has certified that either of the individuals is likely to return to the home within that period.
- (3) For single individuals and couples, an amount (in addition to the personal needs allowance) for maintenance of the individual's or couple's home if—
 - (i) The amount is deducted for not more than a 6-month period; and
 - (ii) A physician has certified that either of the individuals is likely to return to the home within that period.

42 C.F.R. § 435.725(d). Nothing in the rule language persuades me that the agency has erred here. As such, her patient liability will remain unchanged.

I add, assuming petitioner's representatives find this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

1. The agency incorrectly terminated petitioner's MA from May 15, 2013 through June 12, 2013 due to divestment.
2. The ownership of some, if not all, of the alleged divested property was returned to the individual who originally disposed of it.
3. The agency correctly denied the home maintenance deduction when it determined the petitioner's MA institutional patient liability effective June 13, 2013.

THEREFORE, it is

ORDERED

The matter be remanded to the agency (1) to review the accounting of the transferred monies from petitioner's account to [REDACTED]'s account, (2) to determine what amount of funds were utilized to pay for petitioner's expenses, (3) to determine what amount, if any, was not 'returned' to petitioner by paying for her expenses, (4) redetermine if any divestment occurred, and (5) if necessary, determine if s/he met all other eligibility requirements during this retroactive adjustment period. The agency shall issue a notice of decision regarding this redetermination. Because this redetermination may likely require verification regarding all of the expenditures (invoices, checking account statements, etc.) and additional time for doing so, these actions shall be taken within thirty (30) days of the date of this decision. In all other respects the petition for review herein is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

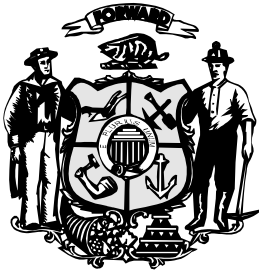
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 10th day of December, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on December 10, 2013.

Waukesha County Health and Human Services
Division of Health Care Access and Accountability
Tknapp808@gmail.com